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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, *et al.*,
Cross-Petitioners,

v.

THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA, *et al.*,
Petitioners.

CROSS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILLIAM L. TAYLOR
CENTER FOR NATIONAL POLICY REVIEW
Catholic University Law School
Washington, D.C. 20064
202/832-8525

JOHN WOOD
BAMBERGER AND FEIBLEMAN
45 North Pennsylvania
Indianapolis, Indiana 46204

Attorneys for Cross-Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Where lower courts have found an inter-district violation of the Fourteenth Amendment causing area-wide racial segregation between the public schools of a central city district and those of suburban districts within the city, does a remedy limited to the one-way transfer of black students from the central city to suburban districts meet the constitutional test of providing relief commensurate with the scope of the violation where:

a) the one-way character of the plan places inequitable burdens on black students, and

b) the Court of Appeals has found that the most closely tailored relief for the inter-district boundary violation would be consolidation of school districts within the city,

and no compelling justification has been advanced for the limitations placed on the remedy?

LIST OF PARTIES

Cross-petitioners are the Board of School Commissioners of the City of Indianapolis, together with its elected members and appointed Superintendent of Schools, in their official capacities, referred to herein as "IPS." Petitioners not listed in the caption are the Metropolitan School Districts of Lawrence, Warren, Wayne and Decatur Townships, Marion County, Indiana; the Franklin Township Community School Corporation, Marion County, Indiana; the School Town of Speedway, Marion County, Indiana; the School City of Beech Grove, Marion County, Indiana; Otis R. Bowen, as Governor of the State of Indiana; Theodore L. Sendak, as Attorney General of the State of Indiana; Harold H. Negley, as Superintendent of Public Instruction of the State of Indiana; and the Indiana State Board of Education, a public corporate body. Other parties to the proceeding in the United States Court of Appeals are the United States of America, Donny Brurell Buckley and Alycia Marquese Buckley; the Metropolitan School Districts of Pike and Washington Townships, Marion County, Indiana; the Metropolitan Development Commission of Marion County, Indiana; and the Housing Authority of the City of Indianapolis, Indiana.

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CROSS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Cross-petitioners, the Board of School Commissioners of the City of Indianapolis, Indiana, *et al.*, (IPS), pray that the Court grant this cross-petition for writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on April 29, 1980.

OPINIONS BELOW

The opinions below on which this cross-petition is based are:

Opinions of the Court of Appeals, not yet reported (JA 1) affirming in part and vacating in part the

judgment of the district court entered July 9, 1979 (JA 130)[1].

Opinion of the district court dated July 11, 1978, 456 F.Supp. 184 (JA 84).

Opinion of the district court on limited remand relating to remedy, dated April 24, 1979, unreported (JA 101).

Prior opinions in the case relevant to this appeal are, in chronological order, as follows:

Opinion of the district court dated August 17, 1971, 332 F.Supp. 655 (IPS A. 1), affirmed by opinion of the Court of Appeals dated February 1, 1973, 474 F.2d 81.

Opinion of the district court dated July 20, 1973, 368 F.Supp. 1191 (IPS A. 10) supplemental opinion of the district court dated December 6, 1973, 368 F.Supp. 1223 (IPS A. 44), vacated and remanded by opinion of the Court of Appeals dated August 21, 1974, 503 F.2d 68.

Opinion of the district court dated August 1, 1975, 419 F.Supp. 180 (SA 36), affirmed by opinion of the Court of Appeals dated July 16, 1976, 541 F.2d 1211 (SA 1).

Opinion of the Court of Appeals dated February 14, 1978, remanding the case to the district court, 573 F.2d 400 (JA 54).

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[1] This cross-petition seeks review of separate issues arising from the judgment of the Court of Appeals which is also the subject of petitions previously filed by other parties in Docket Nos. 79-1975, 79-2001 and 79-2067. An appendix is filed with this cross-petition and cited herein as "IPS A." Petitioners adopt by reference the separately bound Joint Appendix (cited as JA) previously filed by the petitioners in Nos. 79-1975 and 79-2001, which includes the judgments sought to be reviewed (JA 130, JA 136), and also the separate supplemental appendix (cited as "SA") filed with the petition in No. 79-2067.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals sought to be reviewed by this petition was entered April 29, 1980. No petition for rehearing was filed. This court has jurisdiction to review the judgment under 28 U.S.C. ¶ 1254(1) and 28 U.S.C. ¶ 2101(c).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This case involves interpretation and application of Section 1 of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, which reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Certain statutes of the State of Indiana which are relevant to issues presented by other petitioners seeking review of the judgment below, but which are not relevant to issues presented in this petition, are described in the petitions in Nos. 79-1975, 79-2001 and 79-2067.

STATEMENT

Since 1969, the City of Indianapolis has been governed by a unified city-county council which has jurisdiction over all the territory in Marion County, Indiana.

Within this unified area, however, there are 11 separate school corporations. In 1970, IPS, the largest of

these school districts, while enrolling less than 60% of the total number of public school students had more than 97% of all black students in the city. (JA 6). While petitioner Lawrence, et al. notes (Lawrence Petition pp. 7-8) that the black student population of the non-IPS school districts has increased somewhat since 1970, almost all of this increase has occurred in the Pike and Washington school corporations, two districts not involved in the current proceedings (JA 118). Even including Pike and Washington, the suburban school corporations remain 94% white while the enrollment in IPS has risen to more than 47% black. (JA 109-112).

The highly segregated character of public schools in Marion County—extreme even when compared to other metropolitan areas [2]—did not come about accidentally or through the exercise of free choice by black and white citizens. Rather, the lower courts have found that it is the product of a series of discriminatory actions in which state officials have been implicated either directly or indirectly and which were carried out over a long period of time.

Violation. In its 1971 decision, the district court, in holding that IPS had maintained a racially dual school system at the time of the *Brown* decision and that it had not dismantled the dual system, found that the State of Indiana, unlike many other Northern and Western states, had for long periods of time required segregated schools by state law and official policy. (IPS A 5-8). In its

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[2] In Marion County 89% of all black students attending public schools are in IPS and 11% in the suburbs. Nationally, of blacks who live in metropolitan areas, 74% reside in central cities and 26% live in the suburbs. U.S. Bureau of the Census, Current Population Reports, Series P-20, No. 336 and Statistical Abstract of the United States, 1977.

1973 decision [3], the district court determined that state officials ultimately charged under Indiana law with the responsibility of operating the public schools had caused and promoted segregation within IPS and, even after the state segregation policy had been officially dropped, had done "next to nothing" to dismantle the dual school system. (IPS A 29). On appeal, this holding was af-

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[3] The inter-district issues in this case were first litigated after the 1971 district court decision when respondents Buckley intervened and joined as additional defendants other school districts in Marion County and the Indianapolis metropolitan area. (The case was originally commenced as an intra-district action by the United States pursuant to § 407(a) and (b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6(a) and (b)). In their amended complaint based on 42 U.S.C. §§ 1983 and 1988 and asserting jurisdiction under 28 U.S.C. § 1343(3), the Buckleys alleged inter-district violations and prayed for relief "including if necessary" consolidation or merger of the defendant school systems. IPS later joined the effort to obtain inter-district relief and in 1978 sought to realign itself as a party plaintiff and to obtain a full evidentiary hearing on issues relating to the nature and scope of the inter-district violation. From a denial of this motion, IPS appealed and obtained a limited remand for hearings on "which alternative remedy . . . is necessary and equitable to overcome the combined effect of all the constitutional violations previously found by the district court." Unreported Opinion, August 11, 1978, p. 2 (7th Cir.).

Although the District Court has been reluctant to order complete intra-district relief while the inter-district issues were pending (IPS A 45), partial relief has been implemented and IPS and the United States have agreed to complete the process in September 1980. Moreover, the Court of Appeals directed the District Court to give prompt attention to formulating more comprehensive intra-district relief for September, 1980 regardless of the status of inter-district remedy (JA 28). Thus intra-district remedy is not involved in these proceedings.

firmed. 503 F.2d 68, 80 (7th Cir., 1974), *cert. denied* 421 U.S. 929 (1975).

In addition, the district court's 1971 opinion set out a number of historical practices of racial discrimination in housing that had contributed to the growth of segregated neighborhoods and schools in the Indianapolis area. These included a racial zoning ordinance ultimately declared unconstitutional by a state court, the widespread use of racially restrictive covenants which were "routinely enforced" until 1948, and police toleration or enforcement of practices, including violence, designed to exclude blacks from white neighborhoods. (IPS A 2-4).

In its 1971 and 1973 opinions, the district court specifically found that these housing practices, along with segregative public housing actions, were principally responsible for the racial disparities in housing and school enrollments that existed in Marion County (IPS A 8-9, 31-32), a finding later affirmed by the Court of Appeals. (SA 22-24).

After a Court of Appeals remand for reconsideration in light of this court's decision in *Milliken I* and further evidentiary hearings, the district court in 1975 held that there were two inter-district violations of the Fourteenth Amendment within the meaning of *Milliken I*: 1) the 1969 state legislative actions which confined IPS to its pre-1969 boundaries (coterminous with the old city of Indianapolis) when municipal governments were being replaced by a unified county-wide government (Uni-Gov) (SA 40-41) and 2) a series of state actions in the 1960s confining public housing, whose residents were almost exclusively black, to areas within the boundaries of IPS. (SA 46). The holding was based in part on findings that Marion County officials had sought to discourage black people from purchasing or renting homes in the suburbs and that the exclusion of public housing from suburban areas of Marion County and the failure to consolidate school districts were based on such suburban resistance.

(SA 39-40). See also, IPS A 32, 8-9, 29-30. On appeal, the Court of Appeals affirmed the findings of the district court and the remedy ordered as in accord with the principles of *Milliken I.* (SA 26).

After this court's remand (429 U.S. 1068) for reconsideration in light of *Arlington Heights* and *Washington* v. *Davis* and a Court of Appeals remand (JA 54) with specific instructions, the district court in 1978 made new findings with respect to racial intent. It held 1) that "the action(s) of the General Assembly were done, at least in part, with the racially discriminatory intent and purpose of confining black students in the IPS school system to the 1969 boundaries of that system, thereby perpetuating the segregated white schools in suburban Marion County" (JA 92) and 2) that "the action of . . . official bodies in locating [public] housing projects within IPS, as well as the opposition of the suburban governments to the location of public housing within their borders, were racially motivated with the invidious purpose to keep the blacks within pre-Uni-Gov Indianapolis and IPS, and to keep the territory of the added suburban defendants segregated for the use of whites only." (JA 93-94).

The Court of Appeals sustained these findings of racial intent completely (JA 11, 16) except with respect to two districts, Speedway and Beech Grove, where it called for further proceedings to determine whether the districts were affected by the violation. (JA 24-27). In doing so, the Court determined that the plaintiffs had met their burden of proving systemwide discrimination. (JA 21).

Remedy. While the violation found by the courts below is pervasive and systemwide in character, the remedy ordered is extremely limited. In 1975, the district court, in order to raise the proportion of black students in suburban schools to 15% of their total enrollment, ordered the transfer of approximately 9,500 IPS students to several of the suburban districts. (SA 44-46). In hearings held after the 1978 remand, cross-petitioner IPS

offered as alternatives to the relief previously ordered a comprehensive desegregation plan (Plan C) and a more limited "two-way" plan (Plan B) calling for the reassignment of a number of suburban students to IPS equal to the number of suburban students to be transferred to IPS.[4] The United States suggested that an appropriate

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[4] In support of these plans, IPS presented extensive evidence including the testimony of a nationally renowned demographer that the numerous intra-district school violations (including boundary violations, discriminatory site selection, discriminatory use of busing, faculty and staff discrimination and segregation, and the use of optional attendance zones) had probable inter-district effects on the racial composition of suburban public schools and neighborhoods; the testimony of a housing expert on the continuing segregative effects on housing patterns of past discriminatory housing practices; and other evidence (presented by the United States as well as IPS) that the pre-existing housing violation had been compounded and its effects exacerbated by new discriminatory acts by public officials. But the district court chose not to credit the testimony on the inter-district effects of intra-district school violations (JA 113), made no findings despite a specific Court of Appeals request (JA 69) on the continuing segregative effects of past housing practices and discounted evidence of new housing violations on grounds that it "may well lead to further proceedings against HACI, but is otherwise of little help in arriving at an appropriate remedy." (JA 109).

The Court of Appeals held that the district court had discretion to reject the expert testimony on inter-district effects of intra-district discrimination (JA 16-18) and that the district court's failure to make findings on the current impact of past discriminatory housing practices was not clear error. (JA 12-13). The Court did not comment on the district court's discounting of evidence of new housing violations.

In view of the fact that the Court of Appeals found a systemwide violation even in the absence of the evidence cited above, cross-petitioner does not seek a review of these evidentiary rulings.

remedy might include annexation or expansion of the boundaries of IPS to the city borders. (JA 103). The district court, however, viewed the effects of the inter-district violations as circumscribed by the public housing violation, which the court attempted to quantify mathematically to a number approaching the transfers previously ordered. (JA 105-107, 117-118). On this reasoning the court again determined that a reassignment plan would be limited to the relief the court had ordered before hearing evidence on the subject in 1975 and 1978, adjusting the plan only to take into account the slightly reduced numbers of transfers needed to bring each suburban district up to 15% black enrollment. (JA 118).

On appeal, the Court of Appeals found that the district court made numerous errors in its treatment of remedy. It held that the district court erred: 1) in misconstruing *Dayton I* to require that a party prove, even where a systemwide violation has been established, precisely what effect each individual act of discrimination had on the current pattern of segregation (JA 20-21); 2) in discounting the effect of the state legislative violation on grounds that Uni-Gov would never have been enacted if expansion of school boundaries was required (JA 21-22); and 3) in holding that it had no power to order a suburban child to be transferred out of its own school corporation. (JA 23-24). Moreover, the Court of Appeals found that "[t]he most closely tailored remedy would likely be one that would allow IPS to expand to the city borders." (JA 22).

Despite these errors, the Court of Appeals determined that it was within the discretion of the district court to circumscribe the remedy. The failure to order expansion of IPS to the city borders, the remedy the Court viewed as "most closely tailored to the violation," could have been based on the fact that it "would have been far more intrusive into local political processes" (JA 22), despite the fact that the district court had not made findings on this question. The limitation of inter-district

remedy to one-way transfers was deemed appropriately based on the fact that white students *within* IPS would be reassigned and on statements the district court had made about "generally better facilities in the outer districts" and "closing of obsolete schools" within IPS [5] (JA 23), despite the fact that the decision was colored by the district court's erroneous view that it lacked authority to order two-way relief and the Court of Appeals' "concerns about possible inequities of the plan." (JA 23).

Accordingly, notwithstanding its finding of a system-wide violation throughout Marion County, the Court of Appeals rejected the efforts of cross-petitioner to secure a broader remedy and sustained the district court's limited one-way plan.

REASONS FOR GRANTING THE WRIT

At least since 1971, this Court has consistently expounded the principle that in school desegregation cases, "the nature of the violation determines the scope of the remedy" *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). The principle applies not only to school systems where racial segregation was statutorily mandated at the time of *Brown*, but to systems, such as the one here, where statutory authorization for segregation was abandoned shortly before *Brown* and to those where it never existed at all. *Keyes* v. *School*

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[5] This was an apparent reference to a statement of the district court in its 1973 opinion that data showed that 21 predominantly black IPS elementary schools "are substantially out of line with the requirements of present Indiana law and regulations establishing minimum acreage requirements for elementary schools" and to a speculation in the same opinion that older IPS schools would probably "afford inadequate educational plant facilities viewed in the light of current standards." (IPS A 57-58). The district court repeated in its 1979 opinion that the one-way plan would "afford [IPS] the opportunity to discontinue obsolete buildings." (JA 114-115).

District No. 1, Denver, 413 U.S. 189 (1973). In those systems as well, proof of a systemwide violation requires a systemwide remedy, one that desegregates the "entire system 'root and branch' " *Keyes* at 213, citing *Green* v. *County School Board of New Kent County*, 391 U.S. at 438 (1968).

On at least two occasions since 1971, this Court has set aside remedies which it determined exceeded the scope of the violation found by the courts below. *Milliken* v. *Bradley*, 418 U.S. 717 (1974); *Dayton Board of Education* v. *Brinkman* [*Dayton I*], 433 U.S. 406 (1977).

This cross-petition presents the obverse issue, whether a remedy which *falls short* of the violation found by the lower courts, one which the court below acknowledged was not "most closely tailored" to redress the violation (JA 22) and contained "possible inequities" (JA 23) in its one-way character, can pass constitutional muster. While this Court has not yet had occasion to rule directly on the issue posed, the principles it has enunciated strongly suggest that the circumscribed remedy here ordered for a pervasive violation cannot be permitted to stand.

As recently as 1979, this Court reaffirmed the basic rule that "a remedy imposed by a court of equity should be commensurate with the violation ascertained" *Columbus Board of Education* v. *Penick*, 443 U.S. 449 at 465, adding in the words of *Swann* and *Green* that where a racially discriminatory school system has been found to exist the obligation is "to come forward with a plan that promises realistically to work . . . until it is clear that state imposed segregation has been *completely* removed." *Id.* at 459 [emphasis supplied]. Moreover, while this Court has not yet ruled directly on the question of whether a plan exempting large numbers of white students from reassignment and placing the burden of transfer almost entirely on black students is an appropriate remedy for a systemwide violation, it has con-

sistently sustained two-way remedies in major urban cases arising in the North as well as the South. See *Swann, supra; Columbus, supra; Dayton Board of Education* v. *Brinkman* [*Dayton II*], 443 U.S. 526 (1979).[6]

The limitations placed on remedy by the court below also bring the Seventh Circuit into conflict with decisions of the Third, Fifth, Sixth and Eighth Circuits which have all held at a minimum that plans which call for the closing of black schools and the transfer of disproportionate numbers of black students bear a heavy burden of justification. See *Evans* v. *Buchanan*, 582 F.2d 750, 760 (3rd Cir., 1978), *cert. denied* —— U.S. ——, 64 L.Ed. 2d 278 (1980); *Lee* v. *Macon County Board of Education*, 448 F.2d 746, 753 (5th Cir., 1971); *Arvizu* v. *Waco Independent School District*, 495 F.2d 499, 508 (5th Cir., 1974) *rehearing denied* 496 F.2d 1309 (1974); *Kelley* v. *Metropolitan City Board of Education of Nashville*, 463 F.2d 732, 751-752 (6th Cir., 1972) (McCree, J., concurring) *cert. denied* 409 U.S. 1001 (1972); *NAACP* v. *Lansing Board of Education*, 559 F.2d 1042, 1052 (6th Cir., 1977); *Haney* v. *County Board of Education of Sevier County*, 429 F.2d 364 (8th Cir., 1970).[7]

At one level, these decisions seek to place appropriate limitations on the unbridled exercise of discretion. As the Court of Appeals said in *Evans*:

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[6] *McDaniel* v. *Barresi*, 402 U.S. 39 (1971), relied on by the district court (JA 115), involved a challenge by white parents to a voluntary plan and did not address the issue of two-way transfers.

[7] Even in cases where black schools are closed or one-way transfers are adopted not to cure an unconstitutional condition but as a voluntary matter, some degree of justification of the unequal burdens imposed is required. See *Parent Association of Andrew Jackson High School* v. *Ambach*, 598 F.2d 705, 718 (2nd Cir., 1979); *Johnson* v. *Board of Education of City of Chicago*, 604 F.2d 504 (1979), *cert. granted* 48 U.S.L.W. 3852 (June 24, 1980).

> The Supreme Court teaches that the exercise of discretion involves certain functional parameters: "Discretion imports not the court's 'inclination, but its judgment; and its judgment is to be guided by sound legal principles.' Discretion is vested . . . to allow the most complete achievement of the objectives . . . attainable under the facts and circumstances of the specific case." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 770-771, quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975). 555 F.2d at 378.

See also, *Morrilton School District No. 32* v. *United States*, 606 F.2d 222, 229 (8th Cir. 1979) *cert. denied* —— U.S. ——, 62 L.Ed. 2d 758 (1980). *Cf. Dayton I*, 433 U.S. at 409-410.

At a more fundamental level, the question of whether lower courts have unfettered discretion to decree one-way remedies for pervasive violations goes to the heart of the issue of invidious racial distinctions which was at stake in *Brown*. As Judge McCree said in *Kelley*:

> Without a compelling justification, adoption of a plan that places a greater burden of accomplishing integration on black students and their parents is impermissible, whether this be phrased in terms of an equal protection violation . . . or in terms of an abuse of the court's discretion in fashioning an equitable remedy to rectify the effects of past injustice. 463 F.2d at 751.

Part of the evil of such one-way programs is that they cause the burden "to fall disproportionately on Blacks" and have "the effect of keeping the 'neighborhood school policy, a reality for whites, while making it chimerical for Blacks" *NAACP* v. *Lansing Board of Education*, *supra* at 1052. And, as the Third Circuit said in *Evans*, such a plan "carries with it the tacit assumption that only—and that all—black students benefit from transferring to a white environment, and not *vice versa*." 582

F.2d at 760. See also, *Brice* v. *Landis*, 314 F.Supp. 974 (N.D. Cal., 1969), where the district court said that under one-way transfers "the minority children are placed in the position of what may be described as second-class pupils." *Id.* at 978.

If, as indicated, plans which heavily burden minority students must bear a heavy burden of justification, the rationalizations for the district court's one-way plan that remained after the Court of Appeals had cleared away the major legal errors do not meet the test. While it is true that some white students were subject to transfer, those transfers were designed *only* to remedy the intra-district violation and were to occur in only one of the nine districts covered by the district court's plan, leaving all of the suburban corporations as limited participants in the plan. Moreover, the transfer of some white students under one aspect of a plan hardly mitigates their exemption from transfer under other portions of the remedy. See *Arthur* v. *Nyquist*, 473 F.Supp. 830, 840 (W.D. N.Y., 1979).

Nor do cursory references, even if capable of substantiation, to "generally better facilities in the outer districts" (JA 23) or "closing of obsolete schools" within IPS (JA 23) provide a convincing justification especially when these factors were not weighed against the economic and psychological harm that inheres in the closing of facilities and loss of student population in the district that will continue to contain the largest number of black students.

Nor can invocation of the rubric of "political intrusiveness" justify the adoption of a remedy which falls substantially short of curing the constitutional violation found. In *Milliken I*, this Court, while calling for appropriate deference to local political autonomy, specifically stated that "[s]chool district lines . . . are not sacrosanct and if they conflict with the Fourteenth Amendment fed-

eral courts have a duty to prescribe appropriate remedies." 418 U.S. at 744. See *Wright* v. *Council of the City of Emporia*, 407 U.S. 451 (1972); *United States* v. *Scotland Neck Board of Education*, 407 U.S. 484 (1972). In the cases which have arisen since *Milliken* in which violations of an inter-district nature have been found, lower courts uniformly have required or approved remedial plans in which the affected districts were consolidated and treated as a single, unified desegregation area for student reassignment purposes. *Evans* v. *Buchanan*, 555 F.2d 373, 381-382 (3rd Cir., 1977), *cert. denied*, 434 U.S. 880 (1977), 582 F.2d 750 (3rd Cir., 1978) (affirming final student reassignment plan in consolidated district), *cert. denied* —— U.S. ——, 64 L.Ed. 2d 278 (1980); *Morrilton School District No. 32* v. *United States*, 606 F.2d 222 (8th Cir., 1979), *cert. denied* —— U.S. ——, 62 L.Ed. 2d 753 (1980); *United States* v. *State of Missouri*, 515 F.2d 1365 (8th Cir. 1975), *cert. denied* 423 U.S. 951 (1975). *Cf. Cunningham* v. *Grayson*, 541 F.2d 538 (6th Cir., 1976), *cert. denied* 429 U.S. 1074 (1977). Consolidation in these cases was required despite its political intrusiveness because, in the words of *Milliken I*, it was the remedy needed "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct" 418 U.S. at 746. It was precisely this reasoning that led the court below to conclude that expansion of IPS boundaries was the "most closely tailored remedy".

A final, implicit rationale for the one-way plan is that it will encounter less resistance than a two-way remedy because whites are less opposed to having "their" schools opened to black children than to having their children attend "black schools." But as this Court said in *Brown II*:

> it should go without saying that the vitality of these constitutional principles [those set forth in *Brown I*]

cannot be allowed to yield simply because of disagreement with them. 349 U.S. at 300.

Accordingly, the supposition that a one-way remedy will provide the course of least resistance cannot justify a plan which is both inadequate to redress the adjudicated effects of the inter-district violation and patently discriminatory and unfair to black students.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM L. TAYLOR
CENTER FOR NATIONAL POLICY REVIEW
Catholic University Law School
Washington, D.C. 20064
202/832-8525

JOHN WOOD
BAMBERGER AND FEIBLEMAN
45 North Pennsylvania
Indianapolis, Indiana 46204

Attorneys for Cross-Petitioners